

**ASSEMBLY BILL**

**No. 1037**

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**Introduced by Assembly Member V. Manuel Pérez**

February 18, 2011

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An act to amend Sections 11340.1, 11342.610, 11346.2, 11346.3, 11346.8, and 11346.9 of, and to add Section 11349.95 to, the Government Code, relating to regulations.

LEGISLATIVE COUNSEL'S DIGEST

AB 1037, as introduced, V. Manuel Pérez. Regulations: small business impact.

Existing law, the Administrative Procedure Act, governs the procedure for the adoption, amendment, or repeal of regulations by state agencies and for the review of those regulatory actions by the Office of Administrative Law. The act declares that it is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

This bill would, instead, declare that it is the intent of the Legislature that only the court not substitute its judgment for that of the rulemaking agency.

The act defines “small business” in a manner that does not include certain business activities that exceed prescribed thresholds for annual gross receipts.

This bill would increase the prescribed thresholds for these business activities and would add computer programming, data processing, and systems design to the list of business activities that are not small businesses if they exceed \$25,000,000 in annual gross receipts.

The act requires an agency to submit an initial statement of reasons for proposing a regulation to the office with specified information, including, among other things, a description of reasonable alternatives to the regulation.

This bill would, instead, require an agency to document why no alternatives were developed and list any alternatives that were submitted and determined to be unreasonable.

The act requires an agency, as part of the regulatory adoption process, to assess the potential for adverse economic impact on California business enterprises and individuals, as specified.

This bill would require that the assessment be based on sound economic theory and practice that is generally accepted within the related professional fields. The bill would require the assessment to include a determination whether there is a similar or related regulation that has been adopted by any other regulatory agency and information come from reasonably current existing state publications. The bill would require the agency, as part of the assessment to seek assistance from relevant persons or organizations to identify and develop alternatives to the regulation for consideration by the agency. The bill would require an agency, if it ultimately adopts the regulation, to perform the business assessment again, 5 years after the adoption of the regulation, as specified.

The act requires that an agency submit a final statement of reasons to the office that includes specified information, including, among other things, a determination that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation was proposed.

This bill would, instead, require a determination that no alternative would be equally or more effective in carrying out the purpose for which the regulation was proposed. The bill would also require the final statement of reasons to include a determination whether opportunities for cooperation exist with another state or federal agency that is implementing a similar regulation in order to reduce the cumulative negative impact of the regulation on small businesses.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 11340.1 of the Government Code is amended to read:

11340.1. (a) The Legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations. It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted. It is the intent of the Legislature that agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process. It is the intent of the Legislature that ~~neither the Office of Administrative Law nor the court~~ should *not* substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations. It is the intent of the Legislature that while the Office of Administrative Law will be part of the executive branch of state government, that the office work closely with, and upon request report directly to, the Legislature in order to accomplish regulatory reform in California.

(b) It is the intent of the Legislature that the California Code of Regulations made available on the Internet by the office pursuant to Section 11344 include complete authority and reference citations and history notes.

SEC. 2. Section 11342.610 of the Government Code is amended to read:

11342.610. (a) “Small business” means a business activity in agriculture, general construction, special trade construction, retail trade, wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of electric power, or a health care facility, unless excluded in subdivision (b), that is both of the following:

(1) Independently owned and operated.

(2) Not dominant in its field of operation.

(b) “Small business” does not include the following professional and business activities:

(1) A financial institution including a bank, a trust, a savings and loan association, a thrift institution, a consumer finance company, a commercial finance company, an industrial finance company, a credit union, a mortgage and investment banker, a securities broker-dealer, or an investment adviser.

(2) An insurance company, either stock or mutual.

(3) A mineral, oil, or gas broker.

(4) A subdivider or developer.

(5) A landscape architect, an architect, or a building designer.

(6) An entity organized as a nonprofit institution.

(7) An entertainment activity or production, including a motion picture, a stage performance, a television or radio station, or a production company.

(8) A utility, a water company, or a power transmission company generating and transmitting more than 4.5 million kilowatt hours annually.

(9) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

(10) A manufacturing enterprise exceeding 250 employees.

(11) A health care facility exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts.

(c) “Small business” does not include the following business activities:

(1) Agriculture, where the annual gross receipts exceed ~~one million dollars (\$1,000,000)~~ *seven million dollars (\$7,000,000)*.

(2) General construction, where the annual gross receipts exceed ~~nine million five hundred thousand dollars (\$9,500,000)~~ *thirty million dollars (\$30,000,000)*.

(3) Special trade construction, where the annual gross receipts exceed ~~five million dollars (\$5,000,000)~~ *fourteen million dollars (\$14,000,000)*.

(4) Retail trade, where the annual gross receipts exceed ~~two million dollars (\$2,000,000)~~ *seven million dollars (\$7,000,000)*.

(5) Wholesale trade, where the annual gross receipts exceed nine million five hundred thousand dollars (\$9,500,000).

(6) Services, where the annual gross receipts exceed ~~two million dollars (\$2,000,000)~~ *seven million dollars (\$7,000,000)*.

(7) Transportation and warehousing, where the annual gross receipts exceed ~~one million five hundred thousand dollars (\$1,500,000)~~ *seven million dollars (\$7,000,000)*.

1 (8) *Computer programming, data processing, and systems*  
2 *design, where the annual gross receipts exceed twenty-five million*  
3 *dollars (\$25,000,000).*

4 SEC. 3. Section 11346.2 of the Government Code, as amended  
5 by Section 1 of Chapter 398 of the Statutes of 2010, is amended  
6 to read:

7 11346.2. Every agency subject to this chapter shall prepare,  
8 submit to the office with the notice of the proposed action as  
9 described in Section 11346.5, and make available to the public  
10 upon request, all of the following:

11 (a) A copy of the express terms of the proposed regulation.

12 (1) The agency shall draft the regulation in plain, straightforward  
13 language, avoiding technical terms as much as possible, and using  
14 a coherent and easily readable style. The agency shall draft the  
15 regulation in plain English.

16 (2) The agency shall include a notation following the express  
17 terms of each California Code of Regulations section, listing the  
18 specific statutes or other provisions of law authorizing the adoption  
19 of the regulation and listing the specific statutes or other provisions  
20 of law being implemented, interpreted, or made specific by that  
21 section in the California Code of Regulations.

22 (3) The agency shall use underline or italics to indicate additions  
23 to, and strikeout to indicate deletions from, the California Code  
24 of Regulations.

25 (b) An initial statement of reasons for proposing the adoption,  
26 amendment, or repeal of a regulation. This statement of reasons  
27 shall include, but not be limited to, all of the following:

28 (1) A statement of the specific purpose of each adoption,  
29 amendment, or repeal and the rationale for the determination by  
30 the agency that each adoption, amendment, or repeal is reasonably  
31 necessary to carry out the purpose for which it is proposed. Where  
32 the adoption or amendment of a regulation would mandate the use  
33 of specific technologies or equipment, a statement of the reasons  
34 why the agency believes these mandates or prescriptive standards  
35 are required.

36 (2) An identification of each technical, theoretical, and empirical  
37 study, report, or similar document, if any, upon which the agency  
38 relies in proposing the adoption, amendment, or repeal of a  
39 regulation.

1 (3) (A) A description of reasonable alternatives to the regulation  
2 and the agency's reasons for rejecting those alternatives. In the  
3 case of a regulation that would mandate the use of specific  
4 technologies or equipment or prescribe specific actions or  
5 procedures, the imposition of performance standards shall be  
6 considered as an alternative.

7 (B) A description of reasonable alternatives to the regulation  
8 that would lessen any adverse impact on small business and the  
9 agency's reasons for rejecting those alternatives.

10 (C) Notwithstanding subparagraph (A) or (B), an agency is not  
11 required to artificially construct alternatives, ~~describe unreasonable~~  
12 ~~alternatives, or justify why it has not described alternatives.~~ *The*  
13 *agency shall document why no alternatives were developed and*  
14 *shall list any alternatives that were submitted to the agency by the*  
15 *public and determined to be unreasonable.*

16 (4) Facts, evidence, documents, testimony, or other evidence  
17 on which the agency relies to support an initial determination that  
18 the action will not have a significant adverse economic impact on  
19 business.

20 (5) A department, board, or commission within the  
21 Environmental Protection Agency, the Resources Agency, or the  
22 Office of the State Fire Marshal shall describe its efforts, in  
23 connection with a proposed rulemaking action, to avoid  
24 unnecessary duplication or conflicts with federal regulations  
25 contained in the Code of Federal Regulations addressing the same  
26 issues. These agencies may adopt regulations different from federal  
27 regulations contained in the Code of Federal Regulations  
28 addressing the same issues upon a finding of one or more of the  
29 following justifications:

30 (A) The differing state regulations are authorized by law.

31 (B) The cost of differing state regulations is justified by the  
32 benefit to human health, public safety, public welfare, or the  
33 environment.

34 (c) A state agency that adopts or amends a regulation mandated  
35 by federal law or regulations, the provisions of which are identical  
36 to a previously adopted or amended federal regulation, shall be  
37 deemed to have complied with subdivision (b) if a statement to  
38 the effect that a federally mandated regulation or amendment to a  
39 regulation is being proposed, together with a citation to where an  
40 explanation of the provisions of the regulation can be found, is

1 included in the notice of proposed adoption or amendment prepared  
2 pursuant to Section 11346.5. However, the agency shall comply  
3 fully with this chapter with respect to any provisions in the  
4 regulation that the agency proposes to adopt or amend that are  
5 different from the corresponding provisions of the federal  
6 regulation.

7 (d) This section shall be inoperative from January 1, 2012, until  
8 January 1, 2014.

9 SEC. 4. Section 11346.2 of the Government Code, as added  
10 by Section 2 of Chapter 398 of the Statutes of 2010, is amended  
11 to read:

12 11346.2. Every agency subject to this chapter shall prepare,  
13 submit to the office with the notice of the proposed action as  
14 described in Section 11346.5, and make available to the public  
15 upon request, all of the following:

16 (a) A copy of the express terms of the proposed regulation.

17 (1) The agency shall draft the regulation in plain, straightforward  
18 language, avoiding technical terms as much as possible, and using  
19 a coherent and easily readable style. The agency shall draft the  
20 regulation in plain English.

21 (2) The agency shall include a notation following the express  
22 terms of each California Code of Regulations section, listing the  
23 specific statutes or other provisions of law authorizing the adoption  
24 of the regulation and listing the specific statutes or other provisions  
25 of law being implemented, interpreted, or made specific by that  
26 section in the California Code of Regulations.

27 (3) The agency shall use underline or italics to indicate additions  
28 to, and strikeout to indicate deletions from, the California Code  
29 of Regulations.

30 (b) An initial statement of reasons for proposing the adoption,  
31 amendment, or repeal of a regulation. This statement of reasons  
32 shall include, but not be limited to, all of the following:

33 (1) A statement of the specific purpose of each adoption,  
34 amendment, or repeal and the rationale for the determination by  
35 the agency that each adoption, amendment, or repeal is reasonably  
36 necessary to carry out the purpose for which it is proposed.

37 (2) An identification of each technical, theoretical, and empirical  
38 study, report, or similar document, if any, upon which the agency  
39 relies in proposing the adoption, amendment, or repeal of a  
40 regulation.

(3) Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(4) (A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives.

(B) A description of any performance standard that was considered as an alternative. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(C) A description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives.

(D) Notwithstanding subparagraph (A), (B), or (C), an agency is not required to artificially construct alternatives; ~~describe unreasonable alternatives, or justify why it has not described alternatives.~~ *The agency shall document why no alternatives were developed and shall list any alternatives that were submitted to the agency by the public and determined to be unreasonable.*

(5) Facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.

(6) A department, board, or commission within the Environmental Protection Agency, the Resources Agency, or the Office of the State Fire Marshal shall describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues. These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications:

(A) The differing state regulations are authorized by law.

(B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical



1 to a previously adopted or amended federal regulation, shall be  
2 deemed to have complied with subdivision (b) if a statement to  
3 the effect that a federally mandated regulation or amendment to a  
4 regulation is being proposed, together with a citation to where an  
5 explanation of the provisions of the regulation can be found, is  
6 included in the notice of proposed adoption or amendment prepared  
7 pursuant to Section 11346.5. However, the agency shall comply  
8 fully with this chapter with respect to any provisions in the  
9 regulation that the agency proposes to adopt or amend that are  
10 different from the corresponding provisions of the federal  
11 regulation.

12 (d) This section shall become operative on January 1, 2012.

13 (e) This section shall remain in effect only until January 1, 2014,  
14 and as of that date is repealed, unless a later enacted statute, that  
15 is enacted before January 1, 2014, deletes or extends that date.

16 SEC. 5. Section 11346.3 of the Government Code is amended  
17 to read:

18 11346.3. (a) State agencies proposing to adopt, amend, or  
19 repeal any administrative regulation shall assess the potential for  
20 adverse economic impact on California business enterprises and  
21 individuals, avoiding the imposition of unnecessary or unreasonable  
22 regulations or reporting, recordkeeping, or compliance  
23 requirements. For purposes of this subdivision, assessing the  
24 potential for adverse economic impact shall require agencies, when  
25 proposing to adopt, amend, or repeal a regulation, to adhere to the  
26 following requirements, to the extent that these requirements do  
27 not conflict with other state or federal laws:

28 (1) The proposed adoption, amendment, or repeal of a regulation  
29 shall be based on adequate information concerning the need for,  
30 and consequences of, proposed governmental action.

31 (2) The state agency, prior to submitting a proposal to adopt,  
32 amend, or repeal a regulation to the office, shall consider the  
33 proposal's impact on business, with consideration of industries  
34 affected including the ability of California businesses to compete  
35 with businesses in other states. For purposes of evaluating the  
36 impact on the ability of California businesses to compete with  
37 businesses in other states, an agency shall consider, but not be  
38 limited to, information supplied by interested parties.

39 It is not the intent of this section to impose additional criteria on  
40 agencies, above that which exists in current law, in assessing

1 adverse economic impact on California business enterprises, but  
2 only to ~~assure~~ *ensure* that the assessment is made early in the  
3 process of initiation and development of a proposed adoption,  
4 amendment, or repeal of a regulation, *and that the assessment is*  
5 *based on sound economic theory and practice that is generally*  
6 *accepted within the related professional fields.*

7 (b) (1) All state agencies proposing to adopt, amend, or repeal  
8 any administrative regulations shall assess whether and to what  
9 extent it will affect the following:

10 (A) The creation or elimination of jobs within the State of  
11 California.

12 (B) The creation of new businesses or the elimination of existing  
13 businesses within the State of California.

14 (C) The expansion of businesses currently doing business within  
15 the State of California.

16 (2) *All state agencies proposing to adopt, amend, or repeal any*  
17 *administrative regulations shall also assess whether there is a*  
18 *similar or related regulation that has been adopted by any other*  
19 *regulatory agency.*

20 ~~(2)~~

21 (3) This subdivision does not apply to the University of  
22 California, the Hastings College of the Law, or the Fair Political  
23 Practices Commission.

24 ~~(3)~~

25 (4) Information required from state agencies for the purpose of  
26 completing the assessment may come from *reasonably current*  
27 existing state publications.

28 (c) No administrative regulation adopted on or after January 1,  
29 1993, that requires a report shall apply to businesses, unless the  
30 state agency adopting the regulation makes a finding, *based on*  
31 *substantial evidence in the administrative record*, that it is  
32 necessary for the health, safety, or welfare of the people of the  
33 state that the regulation apply to businesses.

34 (d) *The agency shall, in undertaking the assessment required*  
35 *by this section, seek assistance from relevant persons or*  
36 *organizations to identify and develop alternatives for consideration*  
37 *by the agency during the regulation adoption process.*

38 (e) *The assessment required by this section shall be conducted*  
39 *prior to issuing the notice of proposed action described in Section*

1 *11346.5 and again, if the agency ultimately adopts the regulation,*  
2 *in the manner required by Section 11349.95.*

3 SEC. 6. Section 11346.8 of the Government Code is amended  
4 to read:

5 11346.8. (a) If a public hearing is held, both oral and written  
6 statements, arguments, or contentions, shall be permitted. The  
7 agency may impose reasonable limitations on oral presentations.  
8 If a public hearing is not scheduled, the state agency shall,  
9 consistent with Section 11346.4, afford any interested person or  
10 his or her duly authorized representative, the opportunity to present  
11 statements, arguments or contentions in writing. In addition, a  
12 public hearing shall be held if, no later than 15 days prior to the  
13 close of the written comment period, an interested person or his  
14 or her duly authorized representative submits in writing to the state  
15 agency, a request to hold a public hearing. The state agency shall,  
16 to the extent practicable, provide notice of the time, date, and place  
17 of the hearing by mailing the notice to every person who has filed  
18 a request for notice thereby with the state agency. The state agency  
19 shall consider all relevant matter presented to it before adopting,  
20 amending, or repealing any regulation.

21 (b) In any hearing under this section, the state agency or its duly  
22 authorized representative shall have authority to administer oaths  
23 or affirmations. An agency may continue or postpone a hearing  
24 from time to time to the time and at the place as it determines. If  
25 a hearing is continued or postponed, the state agency shall provide  
26 notice to the public as to when it will be resumed or rescheduled.

27 (c) No state agency may adopt, amend, or repeal a regulation  
28 which has been changed from that which was originally made  
29 available to the public pursuant to Section 11346.5, unless the  
30 change is (1) nonsubstantial or solely grammatical in nature, or  
31 (2) sufficiently related to the original text that the public was  
32 adequately placed on notice that the change could result from the  
33 originally proposed regulatory action. If a sufficiently related  
34 change is made, the full text of the resulting adoption, amendment,  
35 or repeal, with the change clearly indicated, shall be made available  
36 to the public for at least 15 days before the agency adopts, amends,  
37 or repeals the resulting regulation. Any written comments received  
38 regarding the change must be responded to in the final statement  
39 of reasons required by Section 11346.9.

(d) No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless the agency complies with Section 11347.1. This subdivision does not apply to material prepared pursuant to Section 11346.9.

(e) If a comment made at a public hearing raises a new issue concerning a proposed regulation, *including, but not limited to, the cumulative impact of the regulation*, and a member of the public requests additional time to respond to the new issue before the state agency takes final action, it is the intent of the Legislature that rulemaking agencies consider granting the request for additional time if, under the circumstances, granting the request is practical and does not unduly delay action on the regulation.

SEC. 7. Section 11346.9 of the Government Code is amended to read:

11346.9. Every agency subject to this chapter shall do the following:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption, amendment, or repeal of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with Section 11347.1.

(2) A determination as to whether adoption, amendment, or repeal of the regulation imposes a mandate on local agencies or school districts. If the determination is that adoption, amendment, or repeal of the regulation would impose a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only

1 to objections or recommendations specifically directed at the  
2 agency's proposed action or to the procedures followed by the  
3 agency in proposing or adopting the action. The agency may  
4 aggregate and summarize repetitive or irrelevant comments as a  
5 group, and may respond to repetitive comments or summarily  
6 dismiss irrelevant comments as a group. For the purposes of this  
7 paragraph, a comment is "irrelevant" if it is not specifically directed  
8 at the agency's proposed action or to the procedures followed by  
9 the agency in proposing or adopting the action.

10 (4) A determination with supporting information that no  
11 alternative considered by the agency would be *equally or* more  
12 effective in carrying out the purpose for which the regulation is  
13 proposed or would be as effective and less burdensome to affected  
14 private persons than the adopted regulation.

15 (5) An explanation setting forth the reasons for rejecting any  
16 proposed alternatives that would lessen the adverse economic  
17 impact on small businesses.

18 (6) *A determination whether opportunities for cooperation exist*  
19 *with another state or federal agency that is implementing a similar*  
20 *regulation in order to reduce the cumulative negative impact of*  
21 *the regulation on small businesses.*

22 (b) Prepare and submit to the office with the adopted regulation  
23 an updated informative digest containing a clear and concise  
24 summary of the immediately preceding laws and regulations, if  
25 any, relating directly to the adopted, amended, or repealed  
26 regulation and the effect of the adopted, amended, or repealed  
27 regulation. The informative digest shall be drafted in a format  
28 similar to the Legislative Counsel's Digest on legislative bills.

29 (c) A state agency that adopts or amends a regulation mandated  
30 by federal law or regulations, the provisions of which are identical  
31 to a previously adopted or amended federal regulation, shall be  
32 deemed to have complied with this section if a statement to the  
33 effect that a federally mandated regulation or amendment to a  
34 regulation is being proposed, together with a citation to where an  
35 explanation of the provisions of the regulation can be found, is  
36 included in the notice of proposed adoption or amendment prepared  
37 pursuant to Section 11346.5. However, the agency shall comply  
38 fully with this chapter with respect to any provisions in the  
39 regulation which the agency proposes to adopt or amend that are

1 different from the corresponding provisions of the federal  
2 regulation.

3 (d) If an agency determines that a requirement of this section  
4 can be satisfied by reference to an agency statement made pursuant  
5 to Sections 11346.2 to 11346.5, inclusive, the agency may satisfy  
6 the requirement by incorporating the relevant statement by  
7 reference.

8 SEC. 8. Section 11349.95 is added to the Government Code,  
9 to read:

10 11349.95. (a) Five years after the adoption of a regulation, the  
11 adopting agency shall again perform the assessment described in  
12 Section 11346.3 for the purpose of determining whether the initial  
13 assessments and projected impacts on small businesses were  
14 accurate and whether the regulation can be modified to further  
15 reduce the negative impact of the regulation on businesses. The  
16 agency shall post the results of the revised assessment on its  
17 Internet Web site.

18 (b) If the agency determines that a regulation can be modified  
19 to reduce the negative impact of the regulation on businesses, then  
20 the agency shall consider undertaking the process to amend the  
21 regulation in that manner.